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Supreme Court, U.S.
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No. 97-551

In The
Supreme Court of the United States

October Term, 1997

JOHN M. BARGE AND OLIVIA L. BARGE,
Petitioners,

v.

ST. PAUL FIRE AND MARINE INSURANCE CO.,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Georgia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The statement of Opinions Below as set forth in Petitioner's Petition for Writ of Certiorari is hereby adopted.

JURISDICTION

This Court lacks jurisdiction to consider this case, because the issue raised by Petitioners is moot, and thus there is no pending case or controversy. Furthermore, this Court should not take jurisdiction because there is no substantial, important federal question present.

SUMMARY OF ARGUMENT

Respondent's first argument is that the issue raised by Petitioners, i.e. whether the Equal Credit Opportunity Act ("ECOA") can be used defensively, is moot because the Superior Court of Fulton County, Georgia ruled on September 8, 1995 that there was in fact no violation of the ECOA by St. Paul regarding the subject arguments. This ruling was not appealed by the Barges. Following conclusion of the appeals on other issues, with acknowledgment by counsel for all parties that no other issues remained in the case, the case was administratively closed, effective August 1, 1997. Therefore, even if Petitioners should prevail on their assertion that the ECOA can be used defensively, there would be no change in result as between the Barges and St. Paul since this issue has already been decided on the merits in St. Paul's favor in a final, binding ruling which cannot be appealed or re-litigated.

Since the ECOA issue is moot, there is no case or controversy, and consequently, this Court lacks jurisdiction.

Respondents' second argument is that in the twenty-two years the ECOA has been in effect, there has been comparatively little litigation on the issue of raising the ECOA defensively, with only **one** Circuit Court of Appeals addressing the issue. Therefore, it is submitted that Petitioners have not shown there is a sufficiently important or substantial federal question which compels this Court's attention.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. STATEMENT OF THE CASE AND PROCEDURAL HISTORY*

Appellees John M. Barge and Olivia L. Barge (collectively referred to as the "Barges") are two indemnitors under a General Agreement of Indemnity dated November 26, 1993 (the "Indemnity Agreement") in favor of St. Paul Fire and Marine Insurance Company ("St. Paul"), in reliance on which St. Paul provided construction surety bonds on behalf of Barge-Wagener, Inc., a general contractor (now known as 1815 Exchange, Inc.) ("BWI").

Prior to execution of the Indemnity Agreement, St. Paul held a General Agreement of Indemnity dated March 25, 1985 executed by BWI and Third Party

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* Citations A through M with page numbers bearing suffix "a" are to the Appendices attached to the Petition for Certiorari. Citations N through Q with page numbers bearing suffix "b" are to the Appendices attached to this Brief.

Indemnity Agreements dated June 2, 1986 executed by John Barge and John Wagener. (L. 87a).

The Indemnity Agreement was required by St. Paul in 1993 as a condition to St. Paul's granting any further suretyship on behalf of BWI because St. Paul had determined that BWI, and the existing indemnitors, John Barge and John Wagener, were no longer sufficiently creditworthy without Olivia Barge's indemnity. (L. 87a-88a). The two principal reasons for requiring Olivia Barge's indemnity in November, 1993 were: (1) for St. Paul to be able to rely on the assets reflected in financial statements provided by John Barge to St. Paul, without risk that Olivia Barge had some property interest therein that could conflict with St. Paul's interest, and (2) for St. Paul to be assured that the assets upon which it was relying in the extension of credit would not be depleted by gifts or other transfers from BWI, its affiliates or John Barge to Olivia Barge. (L. 88a). St. Paul was advised by

John Barge that Olivia Barge was agreeable to furnishing her personal indemnity provided that there were excluded from that indemnity certain of her assets and potential future assets. Negotiations were conducted on those exclusions which ultimately resulted in the language contained in Paragraph 22 of the Indemnity Agreement. (L. 88a-89a). In reliance on the new Indemnity Agreement, St. Paul issued further construction surety bonds on behalf of BWI. (O. 30b, P. 43b, K. 77a, L. 89a-90a).

BWI began having severe financial difficulties in the Spring of 1994, and sought funding from St. Paul to complete construction of the projects on which St. Paul had furnished performance and payment bonds. (O. 30b, P. 43b). BWI, St. Paul, the Barges, and certain other parties reached an agreement concerning funding, which was memorialized in an agreement dated May 18, 1994. (the "May 1994 Agreement"). (O. 30b, P. 43b-44b, K. 77a, N. 1b-21b).

Among other things, under the May 1994 Agreement, the Barges, BWI and others assigned certain property (including tax refunds payable to the Barges on their personal federal and state income taxes, in which Olivia Barge claims a one-half interest) and conveyed security interests in other property to St. Paul. In exchange, St. Paul provided financing to BWI for completion of the projects bonded by St. Paul, and for other purposes. (N. 1b-21b). All disputes under the Indemnity Agreement, the May 1994 Agreement and the other documents executed therewith were to be resolved by arbitration. (N. 15b, N. 19b).

It was essential to St. Paul that Olivia Barge execute the May 1994 Agreement and the other documents she executed in connection therewith (1) to convey her property interest in the tax refunds to St. Paul, (2) to assure St. Paul that whatever interest Olivia Barge had or later acquired in the assets conveyed to St. Paul under the May

1994 Agreement was in fact conveyed to St. Paul (3) to assure St. Paul that those assets would not be depleted later by gift or other transfer to Olivia Barge, and (4) to avoid releasing Olivia Barge from the Indemnity Agreement. (K. 83a-84a). St. Paul would not have entered into the May 1994 Agreement and provided funding to BWI if Olivia Barge had not signed the May 1994 Agreement and the documents executed by her in connection therewith, because St. Paul did not view BWI, its affiliates, and John Barge and John Wagener as sufficiently creditworthy in the absence of her execution. (K. 84a).

With execution of the May 18, 1994 Agreement, St. Paul commenced the funding of completion of the construction projects St. Paul had bonded for BWI, and provided payment of BWI obligations on those projects, and payment of other non-bonded obligations to keep BWI in business. (K. 84a).

Shortly after the execution of the May 1994 Agreement, a dispute arose between St. Paul and the Barges concerning the tax refunds. On January 25, 1995, St. Paul instituted arbitration proceedings before the American Arbitration Association against the Barges, to recover the tax refunds, pursuant to the arbitration clause of the May 1994 Agreement. (N. 15b).

On February 10, 1995 the Barges filed a declaratory judgment action in the Superior Court of Fulton County, Georgia (the "Superior Court") against St. Paul and others (F. 48a) seeking: 1) a declaratory judgment that arbitration was not required of the tax refund dispute (F. 52a-53a); 2) a declaratory judgment that Olivia Barge owned a one-half interest in the tax refunds and that any security interest or lien granted by Olivia Barge to St. Paul was void as a matter of law under the Equal Credit Opportunity Act

(the "ECOA") (F. 52a-53a); and 3) a stay of the arbitration proceedings. (F. 53a).

On March 31, 1995 St. Paul filed its Answer and Counterclaim, (O. 22b-34b) and on April 24, 1995 St. Paul filed a Motion to Stay Proceedings Pending Arbitration. (P. 35b-51b).

On July 13, 1995 the Barges filed an Amendment to Complaint, adding a count seeking a declaratory judgment that the Indemnity Agreement and the May 1994 Agreement were void as a matter of law as to Olivia Barge under the ECOA. (G. 63a-66a).

Following oral argument, the Superior Court by its Order of September 8, 1995 (C. 11a-22a) held, among other things not at issue here: 1) the ECOA cannot be asserted defensively (C. 12a-13a); 2) there was in fact no ECOA violation with respect to either the Indemnity Agreement or the May 1994 Agreement (C. 13a-16a); and 3)

the arbitration should proceed (C. 16a-21a). Thereafter, the arbitration proceedings resumed.

Later in connection with the arbitration an issue unrelated to the Petition for Certiorari arose on which the Superior Court issued an order adverse to St. Paul, and St. Paul applied for and was granted a Certificate of Immediate Review on June 19, 1996. (H. 67a-68a). On July 26, 1996 the Barges cross-appealed that portion of the September 8, 1995 Order which held that the ECOA could not be asserted defensively. (I. 69a-72a).

On February 27, 1997, the Georgia Court of Appeals affirmed the Superior Court's September 8, 1995 Order, finding that it was not error for the Superior Court to prohibit Olivia Barge from asserting the ECOA as a defense to her liability. (B. 2a-10a).

The Georgia Court of Appeals declined to reconsider its decision on March 12, 1997, (D. 23a) and the

Georgia Supreme Court denied the Barges' Petition for Certiorari on June 27, 1997. (A. 1a).

On October 6, 1997 the Superior Court of Fulton County entered its Order, reciting that the judgment of the Court of Appeals was made the judgment of the Superior Court on August 1, 1997, and that,

> "As the parties have agreed that no other issues remain in the underlying case, the above-referenced action has been administratively closed, effective August 1, 1997."

(Q. 52b).

The Barges filed their Petition for Certiorari in this Court on September 29, 1997.

B. REASONS FOR DENYING THE WRIT

1. This Court Lacks Jurisdiction over Petitioners' Appeal Because the Issue Presented for Review Was Rendered Moot by the Specific Finding of the Superior Court of Fulton County, Georgia That There Was No Violation of the Equal Credit Opportunity Act.

This case is improper for review by this Court because there is no ongoing case or controversy regarding the issue raised in the Petition concerning the Equal Credit Opportunity Act ("ECOA") (15 U.S.C. §1691-1691f), and Petitioners will not therefore be affected by any ruling of this Court on the issue presented for review. The issue presented by Petitioners in their Petition, i.e. whether a violation of the Equal Credit Opportunity Act ("ECOA") may be asserted defensively to avoid an obligation, is moot. In their Petition, Petitioners failed to mention that the Superior Court of Fulton County, Georgia (the "Superior Court") made the

specific finding that there was in fact no violation of the ECOA. In Part 2 of its September 8, 1995 Order, after a full discussion of the facts, the Court stated: **"[T]he Court finds that there was no ECOA violation with respect to either of the disputed agreements."** (Emphasis added) (C. 11a). That finding has never been challenged or appealed by Petitioners, and is not at issue here. Following exhaustion of Petitioners' appeals, the case was returned to the Superior Court. In its Order of October 6, 1997 the Superior Court stated:

> The judgment of the Court of Appeals of the State of Georgia was made the judgment of this Court on August 1, 1997. **As the parties have agreed that no other issues remain in the underlying case, the above-referenced action has been administratively closed, effective August 1, 1997.**

(Emphasis added) (Q. 52b).

Thus, whether or not the ECOA may be asserted defensively by Olivia Barge to avoid her obligation

is moot since there is a final and binding judgment not subject to appeal that there is no violation of the ECOA regarding the subject agreements of this case.

This Court does not have jurisdiction to "give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green,* 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895); *see also, North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971).

> "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1994, 1950, 23 L.Ed.2d 491 (1969). Mootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief. *See Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498, 514, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911); 6A J. Moore, J. Lucas & G. Grotheer, Moore's

Federal Practice ¶57.13, at 57-123 to 57-127 & n. 11 (1986) (citing cases).

Carrass v. Williams, 807 F.2d 1286, 1289 (6th Cir., 1986).

It is well settled that under Article III of the United States Constitution, federal courts, including the Supreme Court, may only adjudicate actual, ongoing cases or controversies. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 199, 108 S. Ct. 523, 98 L.Ed.2d 529 (1988); *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975). The federal courts are restricted to adjudging the legal rights of litigants in real, earnest and vital controversies. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471, 1092 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). Article III also requires that the party seeking review show that he himself is adversely affected, and that he has a direct stake in the outcome of the court's decision. *Valley Forge, supra*, 454 U.S. at 472, 102 S.Ct. at 758.

> Article III of the Constitution denies federal courts the power "to decide questions that cannot affect the rights of the litigants in the case before them," *North Carolina v. Rice*, 404 U.S. 244, 246, 30 L.Ed.2d 413, 92 S.Ct. 402 (1971), and confines them to resolving "'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Ibid.* (quoting *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241, 81 L.Ed. 617, 57 S.Ct. 461, 108 ALR 1000 (1937)).

Lewis v. Continental Bank Corp., 494 U.S. 472, 477, 110 S.Ct. 1249, 1253, 108 L.Ed.2d 400, 411 (1990).

"Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70, 104 S.Ct. 373, 374-75, 78 L.Ed.2d 58 (1983). If a federal court of appeals cannot render any effectual relief in favor of appellant, the appeal must be dismissed as moot. *Mills, supra; Calderon v. Moore*, ____ U.S. ____, 116 S.Ct. 2066, 2067, 135 L.Ed.2d

453 (1996). The Supreme Court's lack of jurisdiction to review moot cases derives from the Article III limitation of federal judicial power to cases or controversies. *Securities and Exchange Commission v. Medical Committee for Human Rights,* 404 U.S. 403, 407, 92 S.Ct. 577, 580, 30 L.Ed.2d 350 (1972).

Petitioners have failed to demonstrate a live controversy involving the issue presented for review. On September, 8, 1995, the Superior Court made a specific finding that no violation of the ECOA exists under the facts of this case. This finding was not appealed, and following appeals regarding other issues including Petitioners' unsuccessful appeal on using the ECOA defensively, the Superior Court closed the case upon acknowledgment by counsel for both sides that no issues remained in the case. Therefore, the question as to whether the ECOA can be asserted by the Barges as an affirmative defense to St. Paul's

claim is moot. If, hypothetically, this Court were to rule in favor of Petitioners and hold that the ECOA could be used defensively to avoid liability, there would be no change in the end result because of the Superior Court's ruling there was in fact no violation of the ECOA by St. Paul, and thus the subject agreements remain enforceable.

Accordingly, any opinion rendered in this case upon the question presented would be a prohibited advisory opinion. "'[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" *Flast v. Cohen*, 392 U.S. 95, 96, 88 S.Ct. 1942, 1949, 20 L.Ed.2d 947 (1968).

2. This Case Does Not Present an Important or Compelling Federal Question, and Thus Is Inappropriate for Review by this Court.

The federal question presented must be substantial and important to afford the basis for appellate

review. "A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10, 28 U.S.C.A. The Supreme Court is a court of limited reviewing power, and may not grant certiorari to review a state court judgment in the absence of a substantial, important federal question. *See, e.g., Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-74, 75 S.Ct. 614, 616, 99 L.Ed. 897 (1955). It is not enough that the question raised presents an interesting problem, or that the issue is important to the particular litigants. The requirement of a substantial federal question "impl[ies] a reach to a problem beyond the academic or the episodic." *Rice, supra,* 349 U.S. at 74, 75 S.Ct. at 616.

The issue presented by Petitioners is not of substantial federal importance, and does not deserve this Court's time. The Petition itself proves the point. The ECOA was enacted in 1974, and became effective in 1975.

The subsequent amendments to the ECOA did not affect the operative language relevant to this dispute. For litigation on the subject issue during the twenty-two year time frame since 1975, Petitioners can cite to only **one** Federal Circuit Court decision (Pet. p. 12, *Silverman v. Eastrich Multiple Investor Fund*, 51 F.3d 28 (3rd Cir. 1995), ruling in Petitioners' favor); and ten lower federal court decisions (Pet. pp. 13-14), six in their favor and four against, none of which were apparently appealed to a Circuit Court on the subject issue. Finally, Petitioners cite to only three state court decisions on the subject, one in Virginia and two in Maine in their favor. Additionally, there have been two Georgia state cases on point, including the case at bar, both holding against Petitioners, for a total of five state court decisions on the issue. Plainly, this litigation history does not reflect a highly contested critical issue involving a federal statute which compels this Court's attention.

It is submitted Petitioners have filed their petition solely for the purpose of further delaying completion of the arbitration proceedings which were commenced in January, 1995, and this Court should therefore not grant certiorari.

CONCLUSION

This case does not meet the case or controversy requirement of the United States Constitution because the issue raised by the Petitioners is moot; therefore, the Petition of John M. and Olivia L. Barge should be denied. Furthermore, the Petition should be denied because the question presented for review is not a compelling or important issue warranting this Court's review.

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENTS ST. PAUL FIRE AND MARINE INSURANCE CO.

APPENDIX

APPENDIX N

AGREEMENT

ENTERED into this 18th day of May, 1994, between ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Minnesota corporation, having its principal place of business at 35 Washington Street, St. Paul, Minnesota 55102, referred to as "St. Paul"

AND

BARGE-WAGENER, INC., a Georgia corporation having its principal place of business at 1815 The Exchange, Atlanta, Georgia, hereinafter referred to as "BWI;" and JOHN M. BARGE, JOHN H. WAGENER and OLIVIA L. BARGE, all residents of Atlanta, Georgia, and MEDALLION CAPITAL GROUP, a Georgia general partnership, hereinafter collectively referred to as "Indemnitors."

WHEREAS, BWI, together with the Indemnitors, jointly and severally executed and delivered to St. Paul a Contractor's General Agreement of Indemnity, attached hereto as Exhibit "A," by the terms of which BWI and the Indemnitors agreed to indemnify and hold harmless St. Paul from and against any and all losses, costs, damages and expenses which St. Paul might sustain or incur as the result of or arising out of the execution of bonds, as surety, for BWI, as principal; and

WHEREAS, BWI entered into a number of construction contracts, and St. Paul issued performance and payment bonds for said contracts, which contracts are

identified in Exhibit "B" attached hereto and are hereinafter collectively referred to as the "Bonded Contracts;" and

WHEREAS, BWI and the Indemnitors are in default of their obligations to St. Paul under the terms of the Contractor's General Agreement of Indemnity; and

WHEREAS, BWI is experiencing cash flow difficulties which, if not mitigated, will have an adverse impact upon the work under the Bonded Contracts; and

WHEREAS, BWI has requested financial assistance from St. Paul to continue meeting its various obligations under the Bonded Contracts and to continue paying suppliers and subcontractors and certain general and administrative expenses, and St. Paul has agreed to provide financial assistance subject to the terms and conditions of this Agreement; and

WHEREAS, BWI, the Indemnitors and St. Paul believe that, in order to mitigate damages and lessen costs, it is beneficial for them to cooperate in a joint effort to bring about a timely completion of the various Bonded Contracts:

NOW THEREFORE, intending to be legally bound, for and in consideration of the mutual promises, covenants and agreements contained herein, and for other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, BWI, the Indemnitors and St. Paul agree as follows:

1. ACKNOWLEDGMENT AND RATIFICATION. BWI and the Indemnitors hereby

acknowledge, confirm and ratify their joint and several obligations and liability to St. Paul under the Contractor's General Agreement of Indemnity and further acknowledge that said Contractor's General Agreement of Indemnity remains in full force and effect, except as expressly modified or amended by this Agreement. BWI and the Indemnitors agree that the terms, covenants, conditions and obligations created herein are intended to be in addition to and not in substitution for the rights and remedies presently vested in St. Paul by law and by the terms of the Contractor's General Agreement of Indemnity. BWI and the Indemnitors acknowledge that this Agreement does not in any way reduce the liability of BWI and the Indemnitors under the Contractor's General Agreement of Indemnity or increase the liability of St. Paul under performance and payment bonds issued in connection with the Bonded Contracts.

2. ADVANCES OF FUNDS. St. Paul agrees to make available to BWI advances of funds not to exceed a total of $4,000,000.00 in such amounts and at such times as St. Paul in its sole discretion deems necessary and appropriate: (1) to cover the amounts, if any, by which direct project expenses exceed project revenues for construction projects involving Bonded Contracts and (2) to cover BWI's ordinary monthly general and administrative expenses and vehicle, warehouse and equipment expenses necessary for completion of the Bonded Contracts. St. Paul reserves the right to discontinue advancing funds to BWI at any time without cause. With respect to said advances of funds, if any:

a. St. Paul will be secured in respect to BWI's indebtedness, as set forth in Section 3, hereof.

b. The advances of funds shall be evidenced by a Master Promissory Note payable to St. Paul and bearing interest at any adjustable annual rate equal to the prime lending rate of Trust Company Bank, Atlanta, Georgia, which BWI and the Indemnitors acknowledge may not be the lowest rate of interest charged to borrowers by Trust Company Bank. The Master Promissory Note shall be in the form attached hereto as Exhibit "C." It is understood and agreed that St. Paul may in its sole discretion determine it is necessary to advance funds in excess of the $4,000,000 face amount of the Master Promissory Note, in which event BWI and Indemnitors (excluding Olivia L. Barge) agree to execute like promissory note or notes in favor of St. Paul to evidence said additional indebtedness.

c. The funds will be deposited in special accounts at Trust Company Bank entitled "Barge-Wagener, Inc. Trust Account" and "Barge-Wagener, Inc. Trust Account - General" (hereinafter "Trust Accounts") subject to the addition of St. Paul as a named depositor on said accounts along with BWI. Transactions involving the Trust Accounts shall be governed by Section 6 hereof.

d. Upon any default of BWI under Section 8 hereof, St. Paul will be entitled to withdraw all funds then in the Trust Accounts and apply said funds as described in Section 8 hereof.

3. A. COLLATERAL SECURITY. To collateralize the advances of funds extended by St. Paul to BWI under the Master Promissory Note and any additional promissory note or notes executed by BWI and Indemnitors and to secure St. Paul against any future losses which it may sustain in respect to the Bonded Contracts, or the Contractor's General Agreement of Indemnity, BWI and Indemnitors will grant to St. Paul a security interest in and secured position with respect to any or all of BWI's corporate assets, Medallion's partnership assets and Indemnitors' personal assets, whether realty or personalty, as designated by St. Paul on Exhibit D attached hereto ("Collateral"). BWI and Indemnitors agree, upon demand of St. Paul, to execute and deliver to St. Paul from time to time such security agreements, pledge agreements, mortgages, deeds of trust and other collateral documents, together with related financing statements and other instruments, as St. Paul may request in order to fully evidence and grant to St. Paul security interests in the Collateral, wherever located, and to perfect the rights and secured position of St. Paul in the Collateral. All proceeds from the sale of the Collateral which would otherwise be due BWI and/or Indemnitors shall be paid to St. Paul to reduce the indebtedness hereunder to St. Paul.

B. TAX REFUNDS. To reduce the anticipated indebtedness to St. Paul under this Agreement and related documents, BWI, John M. Barge, Olivia L. Barge, and John H. Wagener hereby assign to St. Paul all of their right, title and interest in and to any federal and state tax refunds due or to become due, for tax years 1995 and earlier, and for the tax year 1996 to the extent they, or any of them, receive payment of any income from BWI or any affiliate thereof, including, inter alia, Charter Properties, Inc. and

Medallion Capital Group. Such funds shall be paid to St. Paul as Collateral Agent and distributed in accordance with the Intercreditor Agreement defined in subparagraph E. Further, John H. Wagener agrees to use his best efforts to obtain a release of any interest that his wife, Bonnie Wagener, may have in said federal and state tax refunds due or to become due. The form of said release shall be subject to St. Paul's approval, and said document shall be furnished to St. Paul upon execution by Bonnie Wagener.

C. HILTON HEAD PROPERTY. To secure his obligations under this Agreement and related documents John H. Wagener hereby grants to St. Paul a security interest in his residence at 12 Planters Road, Hilton Head, South Carolina, which shall constitute a third mortgage subordinate only to a first mortgage held by First Federal Savings, Greenville, S.C. ("First Federal") in the remaining unpaid principal balance of approximately $348,000 and a second mortgage held by First Federal in the remaining unpaid principal balance of approximately $215,000. It is further agreed that John H. Wagener shall use his best efforts to sell said residence, and upon sale of same, at closing the proceeds otherwise due John H. Wagener shall be paid St. Paul as Collateral Agent and distributed in accordance with the Intercreditor Agreement defined in subparagraph E. John H. Wagener warrants and represents to St. Paul that he has the sole title in said residence subject only to the aforesaid mortgages in the amounts stated. The form of said mortgage and other necessary documents shall be subject to St. Paul's approval, and said documents shall be furnished to St. Paul upon execution.

D. CHARTER PROPERTIES, INC. To secure their obligations under this Agreement and related documents John H. Wagener and John M. Barge hereby grant to St. Paul a security interest in all of their stock in Charter Properties, Inc. and their rights to receive monies and other proceeds from same, it being understood and agreed that if and when any monies or other proceeds would otherwise become payable to John H. Wagener or John M. Barge, said monies or other proceeds shall be paid to St. Paul as Collateral Agent and distributed in accordance with the Intercreditor Agreement defined in subparagraph E. The form of documents to effect the terms of this paragraph shall be subject to St. Paul's approval, and said documents shall be furnished to St. Paul upon execution.

E. The parties acknowledge that John M. Barge and John H. Wagener entered into a security agreement dated as of April 15, 1994 granting a security interest in the property described in subparagraphs B, C and D hereof to Alvin Barge. Simultaneously with the execution of this Agreement, Alvin Barge shall release and terminate this security interest and agreement in consideration of St. Paul and Alvin Barge entering into an Intercreditor Agreement which shall provide that Alvin Barge and St. Paul shall share on a pro rata basis in the security as provided for in the Intercreditor Agreement for repayment of their respective indebtedness.

F. WARRANTIES AND REPRESENTATIONS. Exhibits E-1 through E-14 attached hereto have been prepared and furnished by BWI, John M. Barge and John H. Wagener to St. Paul to induce St. Paul to advance funds under this Agreement, and to that end BWI

and Indemnitors (excluding Olivia L. Barge) warrant and represent to St. Paul that: they have provided all supporting financial information to the exhibits as requested by St. Paul; any projections represent an estimate of future performance of the respective jobs prepared by employees of BWI based on available information and assumptions; with respect to any financial statements, they are unaudited and subject to year-end adjustments and the valuation of assets therein was made on disclosed assumptions made by the preparer so that assuming that validity of those assumptions and to the best of the preparer's knowledge, they are not materially misleading overall; and that since preparation of said exhibits no transactions or events have occurred which would render the exhibits materially and adversely untrue except for factors affecting the assumptions upon which value was predicated for any assets. St. Paul acknowledges that it is aware that: the Overlook at Hamilton Place Shopping Center was sold in March, 1994; one of the BWT townhomes was sold in 1994; the financial condition of BWI deteriorated throughout 1993 and has continued; and any financial statements provided by or for BWI are unaudited and subject to adjustment so that ultimate losses may actually be greater than anticipated and as a result the ability of the company to remain a going concern is doubtful.

G. NON-WAIVER. It is understood and agreed by Indemnitors that the granting to St. Paul of rights and interests (including inter alia security interests) under this Agreement and related documents executed in connection herewith shall not waive, release, limit, modify or otherwise adversely affect any other rights and remedies St. Paul may have under this Agreement, related documents executed in connection herewith, the Contractor's General Agreement of

Indemnity (Exhibit "A" hereto) and otherwise existing by contract or by operation of law to recover monies owed it by Indemnitors.

4. PRIORITY RIGHT OF ST. PAUL. BWI and each of the Indemnitors agree that St. Paul, as surety, has a superior and priority right to the receipt of all funds due or to become due on the Bonded Contracts, including all sums earned but unpaid, earned and retained or unearned, and including all claims for extra work, change orders, damages for delays or additional compensation.

5. TRUST FUNDS. St. Paul and BWI recognize that the sums due or to become due on the Bonded Contracts (including, without limitation, all monies previously earned and in the future to be earned, all retainages previously withheld or to be withheld in the future, all claims for additions and extras and all claims for damages, if any) shall remain and continue to be trust funds for the payment of all subcontractor and supplier obligations and for all labor and materials bills on the Bonded Contracts; for payment of the expenses of the type enumerated in Section 2; for the prosecution and performance of all work on the Bonded Contracts; for the indemnity of St. Paul as to all costs and expenses incurred by St. Paul in the completion of the work on the Bonded Contracts including, inter alia, payment for materials and labor, consulting, engineering and other professional fees and expenses, including attorneys' fees, of such professionals; and to repay St. Paul the sums advanced by St. Paul pursuant to Section 2 hereof. To assure BWI's undertaking to apply the trust funds as aforesaid, BWI will direct each of the owners of Bonded Contracts (with the sole exception of the joint-venture project of BWI with Salloum

Const. Co., Inc., the Student Physical Activities Center in Athens, Georgia (hereinafter the "BWI/Salloum Project), in writing, to forward payments to the Barge-Wagener, Inc. Trust Account. BWI agrees that if any owner on any Bonded Contract, notwithstanding the direction, forwards payment to BWI or delivers payment to BWI or any of its representatives, BWI shall forthwith deposit such payment in the Barge-Wagener, Inc. Trust Account.

6. TRUST ACCOUNTS. All withdrawals from the Barge-Wagener, Inc. Trust Account and the Barge-Wagener, Inc. Trust Account - General, shall require two (2) signatures, one of which will be that of a representative designated by St. Paul and the other of which will be that of a representative designated by BWI. BWI will not, without the written consent of St. Paul, change its signature designee. St. Paul will notify BWI of its designated signatory from time to time. All receivables from owners on all projects involving Bonded Contracts, and all recoveries of funds realized in satisfaction of claims asserted by BWI against any party on Bonded Contracts, shall be deposited into the Barge-Wagener, Inc. Trust Account, excepting only those receivables and recoveries on the BWI/Salloum Project. Any funds advanced by St. Paul for payment of BWI's ordinary monthly general and administrative expenses shall be deposited in the Barge-Wagener, Inc. Trust Account - General. Any BWI excess revenues on non-bonded projects, after payment of all materialmen and subcontractors on said projects, shall be deposited to the Barge-Wagener, Inc. Trust Account - General, as follows: The excess of project cash revenues over project expenses on hand shall be determined at the time of project close-out and deposited, and if later-completed projects should result in deficits, St. Paul agrees

monies in the said Trust Account can be used to cover said deficits up to but not exceeding the total of earlier deposits of excess revenues to the Trust Account. If insufficient funds shall be in the Trust Account when needed to meet this obligation, St. Paul shall fund said deficiencies up to but not exceeding the total of earlier deposits of excess revenues, which obligation shall survive a termination of funding by St. Paul under the other terms of this Agreement. It is understood and agreed that the funds in the Trust Accounts are held in trust and to be used exclusively for the purposes set forth in Section 5 hereof. St. Paul shall have the right in its sole discretion to reduce the indebtedness to St. Paul under this Agreement and related documents by withdrawal from the Trust Accounts of any surplus in said accounts which may occur from time to time. It is understood and agreed that in addition to all other rights hereunder, St. Paul shall be deemed to have a security interest in all monies deposited in the Trust Accounts to secure all indebtedness to St. Paul under this Agreement and related documents, and St. Paul may obtain and file all appropriate instruments to perfect said security interest.

7. TRANSFER OF CONSTRUCTION PROJECTS. Upon demand by St. Paul, BWI agrees to negotiate the transfer of any Bonded Contract designated by St. Paul to a completion contractor named by St. Paul. If BWI fails to successfully enter into an agreement to transfer any such project within a reasonable period of time designated by St. Paul, St. Paul shall have the unilateral right (but not the obligation), at St. Paul's sole and absolute discretion, to negotiate with any potential transferee suitable to St. Paul the terms of the transfer of such project, and BWI agrees to transfer said project pursuant to the terms so

negotiated by St. Paul at BWI's sole cost and expense. St. Paul agrees to advance funds necessary to cover the costs and expenses of transferring said project pursuant to Section 2 hereof.

8. DEFAULT. If BWI shall be adjudicated a bankrupt by a Court, or if BWI shall file a petition in bankruptcy, or if BWI is placed in bankruptcy by its creditors, or if BWI shall be declared in default by the owner on any of the Bonded Contracts, or if BWI defaults under this Agreement, or under the promissory note or notes executed pursuant to this Agreement, in addition to all other rights St. Paul shall have the right, immediately upon the happening of any such event, to withdraw all monies then in the Barge-Wagener, Inc. Trust Accounts and to apply all advanced funds as well as all monies received on any of the projects involving Bonded Contracts, for the payment of bills for labor and materials, and for the prosecution of the work, and for the other purposes set forth in this Agreement, it being further understood that all monies remaining after the application of funds for said purposes shall be utilized to indemnify St. Paul for all advances St. Paul has made, all losses St. Paul has incurred, and all indebtedness owed to St. Paul by BWI. In order to accomplish the aforesaid purposes, BWI will, immediately upon the opening of the Trust Accounts established for the deposit of funds advanced by St. Paul, deliver to St. Paul two (2) blank undated checks, drawn on the Barge-Wagener, Inc. Trust Account, and two (2) blank undated checks, drawn on the Barge-Wagener, Inc. Trust Account - General, each made payable to the order of St. Paul and signed by one of BWI's designated signatories, thereby authorizing St. Paul on the happening of any said events to fill in the dates on said check(s) and to insert for the

amount of said check the full balance then in the Trust Accounts in order to enable St. Paul to withdraw the full amount in said Trust Accounts.

9. ACCESS TO RECORDS. St. Paul shall be entitled at all reasonable times to have access, through its designated representatives, to all BWI's and Indemnitors' business records, of any kind, whether or not directly related to the Bonded Contracts. Specifically, and not by way of limitation, St. Paul shall have the right, before signing any check on the Trust Accounts, to examine original business records and documents (such as subcontracts, purchase orders, invoices and delivery receipts) to determine whether the payments to be made are properly chargeable to the contracts in respect to which they are drawn.

10. BONDING. In consideration of the execution of this Agreement by BWI and Indemnitors, and the fulfillment of the obligations of said parties as outlined herein, St. Paul agrees that it will execute appropriate documentation to bond BWI on Phase II of the Greenville Hospital System project, "Conference Center/Cafeteria Expansion." Said documentation may be in the form of issuance of new payment and performance bonds on the aforesaid "Conference Center/Cafeteria Expansion," or necessary modification of existing bonds in favor of Greenville Hospital System on the "Energy Plant/Site Utilities" project. It is understood and agreed that St. Paul will not issue, and BWI will not request the issuance of, any further surety bonds of any sort.

11. EVALUATION OF WORK. St. Paul may determine, in its sole and unlimited discretion, to employ

engineering, financial and construction consultants and attorneys to advise St. Paul concerning the status and progress of performance of the Bonded Contracts. BWI agrees to cooperate fully with such engineering, financial and construction consultants or attorneys and to provide, to the extent of its authority at each site, free access to the site of the Bonded Contracts and those documents relating to the work including but not limited to, accounting records, contract documents, progress and claim reports. BWI further agrees to indemnify St. Paul as to the reasonable expenses incurred by St. Paul in conducting its evaluation. St. Paul agrees to furnish BWI a quarterly accounting of all such costs and expenses paid or incurred.

12. INDEMNITY. Subject to the limitations of Paragraph 19(A) hereof, BWI and the Indemnitors hereby agree to indemnify St. Paul in respect to any costs and losses sustained by St. Paul in connection with advances of funding to BWI, the Master Promissory Note and any additional promissory notes executed by BWI in favor of St. Paul, and agree that all such costs and losses are encompassed within the terms of the Contractor's General Agreement of Indemnity including but not limited to Paragraph 6.

13. OTHER DOCUMENTS TO BE EXECUTED. BWI and the Indemnitors shall execute all such other documents as may reasonably be requested by St. Paul to effectuate the terms and intent of this Agreement, including, without limitation, financing statements, security agreements, promissory notes, or other instruments contemplated under this Agreement.

14. RELATIONSHIPS OF PARTIES UNCHANGED. The execution of this Agreement shall not change the relationship of principal, indemnitor, and surety which now exists between St. Paul, BWI and the Indemnitors. Nothing contained herein, shall in any way waive, diminish or alter the rights afforded St. Paul under the Contractor's General Agreement of Indemnity previously executed by BWI and the Indemnitors.

15. NON-WAIVER. No delay, omission or failure by St. Paul to exercise any right or remedy accruing to it under this Agreement or otherwise shall constitute a waiver, release or abandonment by St. Paul of such right or remedy.

16. APPLICABLE LAW. The laws of the State of Georgia shall govern the provisions of this Agreement.

17. NO ORAL MODIFICATION OR DISCHARGE. This Agreement, together with the Contractor's General Agreement of Indemnity, and the documents executed pursuant to this Agreement, set forth the full understanding of the parties and cannot be modified or discharged by any subsequent oral understanding.

18. ARBITRATION. Any and all disputes arising out of or in connection with execution or performance of this Agreement, including any breach thereof, shall be resolved through Arbitration in accordance with the Construction Arbitration Rules of the American Arbitration Association. The decision of the arbitrators shall be final and binding upon the parties and enforceable in any court having competent jurisdiction.

19. Notwithstanding any other terms of this Agreement which may be to the contrary, the following terms shall govern and control as to the identified matters.

A. Paragraph 22 of the General Agreement of Indemnity attached hereto as Exhibit "A" which provides for exclusion from the terms of said General Agreement of Indemnity of certain assets and proceeds from assets of Olivia L. Barge is incorporated by reference herein as if restated in full and is hereby reaffirmed and ratified by St. Paul as in full force and effect, and said Paragraph 22 shall not be considered modified, waived, released, limited or otherwise amended by the terms of this Agreement or other documents executed in connection herewith in any respect. The limitations of Paragraph 22 shall apply to any obligations of Olivia L. Barge pursuant to this Agreement, the Master Promissory Note and any other notes executed pursuant to this Agreement.

B. The Individual Retirement Account of John M. Barge at Fidelity Investments, Account No. T-0818433 ("IRA") (Exhibit "F" hereto), in its present amount of approximately $100,000.00 and all future interest and other earnings of said IRA are hereby excluded from the terms of the General Agreement of Indemnity and this Agreement so that said property shall not be subject to levy, garnishment or other satisfaction of any judgment which may be entered in favor of St. Paul on any obligation. No future contributions shall be made to said IRA; if any future contributions are made to said IRA, they and any interest and other earnings thereon shall not be excluded hereunder. No other individual retirement accounts, or profit sharing or pension plans, or interest and other earnings thereon, of John

M. Barge or in which John M. Barge may participate shall be excluded hereunder.

C. St. Paul agrees that any proceeds paid by the Marietta Board of Education on a certain claim for additional compensation submitted by BWI on behalf of Barge Construction, Inc., ("BCI") in connection with New South Elementary School (St. Paul Bond No. 0250) shall be paid to BCI if and when BWI receives payment of same, together with an "Owner's Status Report" stating, inter alia, there are no outstanding claims by the owner, and BCI's Contractor's Affidavit, stating, inter alia, all project bills have been paid and there are no outstanding claims of any sort, without any off-set or other deduction by St. Paul; provided, however, if at the time of such payment to BWI there are any written claims made against St. Paul on the performance and payment bonds or any lien bonds furnished in connection with said New South Elementary School project, and two other projects bonded by St. Paul, Hall County Board of Education, South Hall Middle School (St. Paul Bond No. 0249) and Adairsville Development Authority, Georgia North Industrial Building (St. Paul Bond No. 2801), then so much of said payment as equals twice the amount of such claims shall be placed in an interest-bearing escrow account to stand as security to St. Paul and be used for payment of any actual claims against the performance and/or payment bonds or any lien bonds provided by St. Paul on said projects, and any amount remaining in said escrow account after satisfaction of all such obligations and after said possible exposure has terminated shall be paid to BCI. It is understood and agreed that the prosecution of said claim shall be at no cost to BWI, the Indemnitors or St. Paul and that St.

Paul has no responsibility or liability to anyone in connection therewith.

D. BWI, John M. Barge, John H. Wagener, Olivia L. Barge and Medallion Capital Group each warrant that except as expressly set forth in this Agreement, there are no monies owed by one to the other; that neither BWI nor Medallion owes any monies to any person related by blood or marriage to them; and that no person related by blood or marriage to them owes any monies to BWI or Medallion.

E. For the purpose of this Agreement, the term "general and administrative" shall include but not be limited to payment of payroll, vehicle, equipment and warehouse expenses as necessary for completion of the Bonded Contracts.

20. With regard to the BWI/Salloum Project (the Student Physical Activities Center in Athens, Georgia), the parties hereto agree as follows:

(1) All receipts from the owner shall be deposited in the existing joint-venture bank account at Athens First Bank and Trust, Athens, Georgia.

(2) The checks written on said account must be co-signed by duly authorized representatives of BWI and Salloum Const. Co. Inc. and each party's signature must be original and not a facsimile thereof.

(3) Prior to issuing any checks on said account, each joint-venture partner must review and approve

the documentation submitted in support of the payment and agree that payment is due the proposed payee.

(4) St. Paul shall have the right to monitor said joint-venture bank account and review any and all bank statements, deposit slips, cancelled checks, other bank or joint-venture records and the documentation supporting all checks against the account, either before or after such checks are transmitted to payees.

(5) It is contemplated that from time to time St. Paul in its sole discretion may make advances on behalf of BWI for its joint-venture contribution toward project expenses and costs, and that same shall be deposited in the aforesaid joint-venture account and constitute an addition to the indebtedness of BWI to St. Paul under this Agreement and related documents.

(6) In the event there shall be any distribution or distributions to BWI in the future from the joint-venture, same shall be paid to St. Paul to be credited against BWI's indebtedness to St. Paul.

21. This Agreement, including (1) all exhibits and schedules attached hereto (including inter alia Contractor's General Agreement of Indemnity, Exhibit "A" hereto), and (2) all documents executed in connection herewith by one or more of the parties hereto, and all documents and agreements referenced in the aforesaid Agreement, exhibits, schedules and documents shall constitute the entire agreement between the parties hereto, and all prior written statements and agreements not expressly included herein and all prior and contemporaneous oral statements or agreements are deemed

merged into this Agreement and superseded. This Agreement may not be amended orally, but may be amended, modified, supplemented or waived only by a written instrument executed by the appropriate parties. No waiver of any term or provision of this Agreement shall be effective unless it is in writing, making specific reference to this Agreement and signed by the party against whom such waiver is sought to be enforced.

22. This Agreement, and the terms and conditions hereof, shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

23. This Agreement may be executed in any number of counterpart copies, each of which shall be deemed an original, but which together shall constitute a single instrument.

IN WITNESS WHEREOF, the parties have executed these presents the day and year set forth above.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY

By: /s/ Robert A. Wheeler
Its: Authorized Representative
ATTEST: /s/ Patricia F. Erb

BARGE-WAGENER, INC.

By: /s/ John M. Barge
Its: CEO
ATTEST: /s/ Patricia F. Erb

JOHN M. BARGE, An Individual

/s/ John M. Barge
ATTEST: /s/ Patricia F. Erb

JOHN H. WAGENER, An Individual

/s/ John H. Wagener
ATTEST: /s/ Patricia F. Erb

OLIVIA L. BARGE, An Individual

/s/ Olivia L. Barge
ATTEST:

MEDALLION CAPITAL GROUP,
a Georgia General Partnership

By: /s/ John M. Barge
Its: General Partner

By: /s/ John H. Wagener
Its: General Partner
ATTEST: /s/ Patricia F. Erb

[Attachments have been omitted due to volume]

APPENDIX O

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE,	)	
Plaintiff,	)	
vs.	)	Civil Action No. E-35589
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, and ALVIN BARGE,	)	
Defendants.	)	

ANSWER AND COUNTERCLAIM OF ST. PAUL FIRE AND MARINE INSURANCE COMPANY
(Filed March 31, 1995)

COMES NOW Defendant, St. Paul Fire and Marine Insurance Company ("St. Paul"), and files this its Answer to the Complaint in this action and shows the Court as follows:

FIRST AFFIRMATIVE DEFENSE

The claims and disputes which are the subject of this action are required to be resolved through arbitration under that certain arbitration clause contained in Paragraph 18 of that agreement dated May 18, 1994 ("Agreement") between, among others, Plaintiffs John M. Barge and Olivia L. Barge

and St. Paul (a copy of which, excluding exhibits, is attached hereto and made a part hereof as Exhibit "A"). This arbitration was instituted by St. Paul against John M. Barge and Olivia L. Barge before the American Arbitration Association on January 25, 1995. A copy of St. Paul's Demand for Arbitration is attached hereto and made a part hereof as Exhibit "B". Therefore, this action should be dismissed, or in the alternative, stayed pending the outcome of the arbitration.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs have stated insufficient grounds under O.C.G.A. §9-4-1 et seq. for an action for declaratory judgment declaring that no valid agreement to submit to arbitration was made by the parties to this action to arbitrate any dispute relating to tax refunds. Therefore, this action should be dismissed.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs have stated insufficient grounds under O.C.G.A. §9-4-1 et seq. for a declaratory judgment declaring that any security interest or lien purportedly granted by Olivia L. Barge on her interest in tax refunds is void as a matter of law as violating the Equal Credit Opportunity Act, 15 U.S.C. §1691. Therefore, this action should be dismissed.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs have stated insufficient grounds for a stay of the arbitration proceeding commenced by St. Paul against John M. Barge and Olivia L. Barge before the American

Arbitration Association. Therefore, this action should be dismissed.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted.

For the individual numbered paragraphs of the Complaint, St. Paul answers as follows:

1.

St. Paul admits the allegations of Paragraph 1 of the Complaint except for the allegation that St. Paul is a "joint obligor with Defendant, Alvin Barge", and St. Paul states that such agreements as have been executed by St. Paul are the best evidence of their contents, and St. Paul therefore denies the allegations of Paragraph 1 of the Complaint to the extent that they incorrectly or incompletely set forth the terms of said agreements.

2.

St. Paul is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 of the Complaint, and accordingly said allegations are denied.

3.

St. Paul admits the allegations of Paragraph 3 of the Complaint.

4.

For answer to the allegations in Paragraph 4 of the Complaint, St. Paul states that the terms of Paragraph of 3(b) of the May 18, 1994 Agreement are the best evidence of their contents, and accordingly the allegations of Paragraph 4 of the Complaint are denied to the extent they incorrectly or incompletely set forth said terms. Further, St. Paul states that Paragraph 3(b) of the Agreement did in fact constitute an assignment to St. Paul of all of Plaintiffs' right, title and interest in Federal and state tax refunds due on or to become due for tax years 1995 and earlier, and for tax year 1996 to the extent that they received payment of any income from Barge-Wagener, Inc. or any affiliate thereof.

5.

For answer to the allegations in Paragraph 5 of the Complaint, St. Paul states that the terms of Paragraph 18 of the Agreement are the best evidence of their contents, and accordingly the allegations of Paragraph 5 of the Complaint are denied to the extent that they incorrectly or incompletely set forth said terms.

6.

For answer to the allegations in Paragraph 6 of the Complaint, St. Paul states that the terms of the Agreement of May 18, 1994 and the "Pledge Agreement - Pari Passu" of May 18, 1994 are the best evidence of their contents, and accordingly the allegations of Paragraph 6 of the Complaint are denied to the extent they incorrectly or insufficiently set forth said terms. For further answer, St. Paul admits that

Exhibit A attached to the Complaint is a true copy of the "Pledge Agreement - Pari Passu" but states that it must be read in context with the May 18, 1994 Agreement and the other documents executed in connection therewith.

7.

For answer to the allegations in Paragraph 7 of the Complaint, St. Paul states that the terms of St. Paul's Demand for Arbitration before the American Arbitration Association are the best evidence of their contents, and accordingly the allegations of Paragraph 7 of the Complaint are denied to the extent that they incorrectly or insufficiently set forth said terms. St. Paul admits that Exhibit B attached to the complaint is a true copy of St. Paul's Demand for Arbitration against Plaintiffs.

COUNT I

Demand for Declaratory Judgment

8.

St. Paul incorporates herein by reference those answers to the foregoing Paragraphs 1-7 of the Complaint with the same force and effect as if they had been restated herein, as St. Paul's answer to the allegations of Paragraph 8 of the Complaint.

9.

St. Paul denies the allegations of Paragraph 9 of the Complaint and states that the Pledge Agreement must be read in context with and as a part of the May 18, 1994 Agreement

and other documents executed in connection therewith, and accordingly any claims or disputes thereunder must be arbitrated in accordance with the arbitration clause contained in Paragraph 18 of the May 18, 1994 Agreement.

10.

St. Paul denies the allegations of Paragraph 10 of the Complaint.

COUNT II

Declaratory Judgment as to Liability of Olivia L. Barge

11.

St. Paul incorporates herein by reference those answers to the foregoing Paragraphs 1-10 of the Complaint with the same force and effect as if they had been restated herein, as St. Paul's answer to the allegations of Paragraph 11 of the Complaint.

12.

St. Paul denies the allegations of Paragraph 12 of the Complaint.

13.

St. Paul denies the allegations of Paragraph 13 of the Complaint.

COUNT III

Application to Stay Arbitration

14.

St. Paul incorporates herein by reference those answers to the foregoing Paragraphs 1-13 of the Complaint with the same force and effect as if they had seen restated herein, as St. Paul's answer to the allegations of Paragraph 14 of the Complaint.

15.

St. Paul denies the allegations of Paragraph 15 of the Complaint.

WHEREFORE, St. Paul demands judgment as follows:

(a) That this Court enter judgment for St. Paul and against Plaintiffs dismissing this action with prejudice;

(b) Alternatively, that this Court direct Plaintiffs to arbitrate the claims asserted in this action, and that this action be stayed pending the outcome of said arbitration;

(c) That Plaintiffs' demand that all arbitration proceedings be stayed pending the resolution of this action be denied;

(d) Alternatively, that this Court find that the tax refunds received to date, and to be received in the future, by Olivia L. Barge are validly assigned to St. Paul and that said assignment is not in violation of the Equal Credit Opportunity Act, 15 U.S.C.A. §1691;

(e) That all court costs be assessed against Plaintiffs; and

(f) That St. Paul be granted such other and further relief as the Court deems just and proper.

COUNTERCLAIM

NOW COMES Defendant, St. Paul Fire and Marine Insurance Company ("St. Paul") and, subject to its contention, and without waiving its claim, that all and disputes between Plaintiffs and St. Paul in this action are arbitrable in the first instance, states for its Counterclaim against Plaintiffs, as follows:

1.

Defendant, St. Paul, is a Minnesota corporation which is qualified to do business in the State of Georgia.

2.

Plaintiffs, John M. Barge and Olivia L. Barge, are residents of Fulton County, Georgia and are subject to the jurisdiction and venue of this Court.

3.

Plaintiffs, John M. Barge and Olivia L. Barge, are two indemnitors among others under a General Agreement of Indemnity dated November 26, 1993 in favor of St. Paul. A copy of said General Agreement of Indemnity is attached hereto and made a part hereof as Exhibit "C".

4.

In reliance on said General Agreement of Indemnity, St. Paul furnished construction surety bonds on behalf of Barge-Wagener, Inc., as principal, now known as 1815 Exchange, Inc. ("BWI"). John M. Barge was at all relevant times to this action a fifty percent (50%) stockholder and chief executive officer and director of BWI.

5.

In the Spring of 1994, BWI, Inc., suffered severe financial difficulties, and sought funding from St. Paul to complete construction projects on which St. Paul had furnished surety performance and payment bonds. BWI, St. Paul, John M. Barge, Olivia L. Barge, and other indemnitors reached an agreement which was memorialized in the May 18, 1994 agreement (the "Agreement", attached hereto as Exhibit "A").

6.

Under the Agreement Plaintiffs, John M. Barge and Olivia L. Barge, assigned all their right, title and interest in certain tax refunds to St. Paul and agreed to pay same to St. Paul. The specific tax refunds assigned are any Federal and

state tax refunds due or to become due for tax years 1995 and earlier, and for the tax year 1996 to the extent that John M. Barge or Olivia L. Barge receive payment of any income from BWI or any affiliate thereof.

7.

Alternatively, St. Paul alleges that under separate documents executed contemporaneously and as a part of the May 18, 1994 Agreement, John M. Barge and Olivia L. Barge granted a security interest to St. Paul in said tax refunds to secure the loans advanced by St. Paul to BWI, et al.

8.

John M. Barge and Olivia L. Barge have received tax refunds to date totaling in excess of Three Hundred Thousand Dollars ($300,000.00) and they are due to receive further tax refunds in the future. John M. Barge and Olivia L. Barge have failed and refused to pay said tax refunds to St. Paul.

9.

Pursuant to the Agreement of May 18, 1994, St. Paul thereafter loaned BWI and its indemnitors sums totaling in excess of Eleven Million Eight Hundred Thousand and no/100's Dollars ($11,800,000.00) and made other expenditures for or on account of BWI for which John M. Barge and Olivia L. Barge are liable, and St. Paul anticipates future loans and/or expenditures of additional monies which will cause St. Paul's loss and John M. Barge and Olivia L. Barge's liability to St. Paul to be in excess of Twenty Million and no/100's Dollars ($20,000,000.00) over and above the value of such security as is available to St. Paul under the Agreement of May 18, 1994 and related documents.

COUNT I

Breach of Contract - I

10.

St. Paul hereby incorporated by reference Paragraph 1-9 of the Counterclaim with the same force and effect as if they had been restated herein.

11.

In failing and refusing to pay the tax refunds received to St. Paul, John M. Barge and Olivia L. Barge have materially breached the May 18, 1994 Agreement, and the other documents executed in connection therewith.

COUNT II

Breach of Contract - II

12.

St. Paul hereby incorporates by reference Paragraphs 1-11 of the Counterclaim with the same force and effect as if they had been restated herein.

13.

John M. Barge and Olivia L. Barge have breached the General Agreement of Indemnity of November 26, 1993 and the May 18, 1994 Agreement and the other documents executed in connection therewith by failing and refusing to

pay St. Paul funds sufficient to repay St. Paul for loans by St. Paul to BWI, et al. and for other monies expended and to be expended by St. Paul for which John M. Barge and Olivia L. Barge are liable.

14.

John M. Barge and Olivia L. Barge are therefore jointly and severally liable to St. Paul for a sum anticipated to be in excess of Twenty Million and no/100's Dollars ($20,000,000.00).

WHEREFORE, St. Paul demands judgment against John M. Barge and Olivia L. Barge as follows:

(a) That this Court enter judgment in favor of St. Paul and against John M. Barge and Olivia L. Barge for the amount of tax refunds each has received to date, plus interest at Eighteen Percent (18%) per annum, attorneys fees and court costs;

(b) That this Court enter judgment directing John M. Barge and Olivia L. Barge to pay any future tax refunds received by them to St. Paul as provided in the May 18, 1994 Agreement and other documents executed in connection therewith;

(c) That this Court enter judgment in favor of St. Paul and against John M. Barge and Olivia L. Barge jointly and severally in an amount in excess of Twenty Million and no/100's Dollars ($20,000,000.00), the specific amount to be proved at trial; and

(d) That St. Paul be granted such other and further relief as this Court deems just and proper.

This 31st day of March, 1995.

Respectfully submitted,
WASSON, SOURS & HARRIS, P.C.

/s/ Edward H. Wasson, Jr.
Edward H. Wasson, Jr.
Georgia Bar No. 739800

/s/ W. Hensell Harris, Jr.
W. Hensell Harris, Jr.
Georgia Bar No. 331600

300 Galleria Parkway, N.W.
Suite 1000
Atlanta, Georgia 30339
(770) 956-1700

Attorneys for Defendant St. Paul Fire
and Marine Insurance Company

APPENDIX P

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE,	)	
Plaintiff,	)	
vs.	)	Civil Action
	)	No. E-35589
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, and ALVIN BARGE,	)	
Defendants.	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY,	)	
Plaintiff in Counterclaim,	)	
vs.	)	
JOHN M. BARGE and OLIVIA L. BARGE,	)	
Defendants in Counterclaim.	)	

MOTION TO STAY PROCEEDINGS
PENDING ARBITRATION
(Filed April 24, 1995)

COMES NOW, Defendant and Plaintiff in Counterclaim, St. Paul Fire and Marine Insurance Company ("St. Paul"), and by and through undersigned counsel, files this Motion to Stay Proceedings Pending Arbitration and states as grounds therefor the following:

1.

The claims and disputes which are the subject of this action are required to be resolved through arbitration before the American Arbitration Association under that certain arbitration clause contained in Paragraph 18 of that agreement dated May 18, 1994 ("Agreement") between, among others, Plaintiffs John M. Barge and Olivia L. Barge and Defendant St. Paul. A copy of said Agreement, excluding exhibits, is attached to and made a part of the accompanying Affidavit of Robert A. Wheeler ("Wheeler Affidavit") as Exhibit "B".

2.

Pursuant to said arbitration clause, St. Paul instituted arbitration proceedings against John M. Barge and Olivia L. Barge before the American Arbitration Association, in the Atlanta Regional Office, on January 25, 1995, AAA No. 30-110-00011-95 (the "Arbitration"). A copy of St. Paul's Demand for Arbitration is attached to and made a part of the accompanying Wheeler Affidavit as Exhibit "C".

3.

The Arbitration involves the same Agreement, the same separate documents executed by the parties as a part thereof, and the same fact and legal issues which are the subjects of the Complaint in this action.

4.

St. Paul filed its Answer and Counterclaim in this action subject to and asserting its position that the issues in this action should be arbitrated in the Arbitration and that this action should be stayed pending the outcome of the Arbitration, or dismissed.

5.

The Agreement which is the subject of this action is between a Minnesota corporation, St. Paul, and among others, residents of Georgia, John M. Barge and Olivia L. Barge. The construction projects which are the subject of said Agreement are located in foreign states as well as the State of Georgia, and involve subcontractors, suppliers, and employees from foreign states as well as the State of Georgia. Thus, the Agreement, the projects, and the claims and disputes are within interstate commerce.

6.

Because the Agreement which is the subject of this litigation evidences and was entered into and performed in interstate commerce and contains an arbitration clause, the Federal Arbitration Act, 9 U.S.C.A. §1 et seq., is applicable. Therefore, pursuant to 9 U.S.C.A. §3, this Court should stay these proceedings pending the completion of the Arbitration.

7.

This Court is also authorized to order arbitration and to stay these proceedings under the Georgia Arbitration Act, O.C.G.A. §9-9-6.

8.

A proposed order is attached hereto.

WHEREFORE, St. Paul respectfully requests that this Court enter an Order staying this action in its entirety, including discovery, pending the completion of the

arbitration and requiring John M. Barge and Olivia L. Barge to submit the claims that they have asserted in this action in the Arbitration now pending.

This 24th day of April, 1995.

Respectfully submitted,

WASSON, SOURS & HARRIS, P.C.

/s/ W. Hensell Harris, Jr. for
Edward H. Wasson, Jr.
Georgia Bar No. 739800

/s/ W. Hensell Harris, Jr.
W. Hensell Harris, Jr.
Georgia Bar No. 331600

300 Galleria Parkway, N.W.
Suite 1000
Atlanta, Georgia 30339
(404) 956-1700

Attorneys for Defendant and Plaintiff in Counterclaim St. Paul Fire and Marine Insurance Company

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served a copy of the foregoing **"Motion to Stay Proceedings Pending Arbitration" and proposed "Order"** via U.S. Mail, postage prepaid, and properly addressed to the following:

John A. Christy, Esq.
David H. Flint, Esq.
Schreeder, Wheeler & Flint
16th Floor, The Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845

Dated this 24th day of April, 1995.

WASSON, SOURS & HARRIS, P.C.

/s/ W. Hensell Harris, Jr.
W. Hensell Harris, Jr.
Georgia Bar No. 331600

300 Galleria Parkway, N.W.
Suite 1000
Atlanta, Georgia 30339
(404) 956-1700

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE,	)	
Plaintiff,	)	
vs.	)	Civil Action No. E-35589
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, and ALVIN BARGE,	)	
Defendants.	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY,	)	
Plaintiff in Counterclaim,	)	
vs.	)	
JOHN M. BARGE and OLIVIA L. BARGE,	)	
Defendants in Counterclaim.	)	

BRIEF IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING ARBITRATION
(Filed April 24, 1995)

COMES NOW Defendant and Plaintiff in Counterclaim, St. Paul Fire and Marine Insurance Company, ("St. Paul"), and by and through undersigned counsel files this Brief in Support of Motion to Stay Proceedings Pending Arbitration and shows the Court as follows:

1. **This Action Should be Stayed Pending Arbitration Pursuant to the Federal Arbitration Act.**

Plaintiffs John M. Barge and Olivia L. Barge are two indemnitors under a general agreement of indemnity dated November 26, 1993 ("Indemnity Agreement") in favor of St. Paul in reliance on which St. Paul provided construction surety bonds on behalf of Barge-Wagener, Inc., as principal, now known as 1815 Exchange, Inc., of Atlanta, Georgia ("BWI"). In the Spring of 1994, BWI, having severe financial difficulties, sought funding from St. Paul to complete construction projects on which St. Paul had furnished performance and payment bonds. BWI, St. Paul,

and John M. Barge and Olivia L. Barge, and certain other parties, reached an agreement concerning funding which was memorialized in an agreement dated May 18, 1994 ("Agreement"). Copies of the Indemnity Agreement and the Agreement are attached to and made a part of the accompanying Affidavit of Robert A. Wheeler ("Wheeler Affidavit") as Exhibits "A" and "B," respectively.

Among other things, the Agreement contains a provision at Paragraph 3(B) which states that John M. Barge and Olivia L. Barge assigned all their right, title, and interest in certain tax refunds to St. Paul and agreed to pay same to St. Paul. John M. Barge and Olivia L. Barge have received certain tax refunds totaling in excess of $300,000.00 and they have failed and refused to pay same to St. Paul.

The claims and disputes which are the subject of this action are required to be resolved through arbitration under

that certain arbitration clause contained in Paragraph 18 of the Agreement.

Pursuant to the aforesaid arbitration clause, St. Paul instituted arbitration proceedings against John M. Barge and Olivia L. Barge before the American Arbitration Association, in the Atlanta Regional Office, on January 25, 1995, AAA No. 30-110-00011-95 ("the Arbitration") to recover said tax refunds and any future tax refunds.

The Arbitration involves the same Agreement, the same separate documents executed by the parties as a part thereof, and the same fact and legal issues which are the subject of the Complaint in this action.

St. Paul filed its Answer and Counterclaim in this action subject to and asserting its position that the issues in this action should be arbitrated in the Arbitration and that this action should be stayed or dismissed. (Answer and Counterclaim, pages 1, 2, 5, 7, and 8).

St. Paul is a Minnesota corporation, and its principal office is in St. Paul, Minnesota. John M. Barge and Olivia L. Barge are residents of the State of Georgia. The construction projects which are the subject of the Agreement are located in foreign states as well as the State of Georgia, and involve subcontractors, suppliers, and employees from foreign states as well as the State of Georgia. Thus, the Agreement, the projects, and the claims and disputes are within interstate commerce. Because the Agreement, which is the subject of this litigation, evidences and was entered into and performed in interstate commerce and contains an arbitration clause, the Federal Arbitration Act, 9 U.S.C.A. §1 et. seq, is applicable. 9 U.S.C.A. §3 of the Federal Arbitration Act states:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such

> arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Therefore, pursuant to 9 U.S.C.A. §3, this Court should stay these proceedings pending the completion of the Arbitration. See Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 765 (1983).

2. **This action should be stayed pending arbitration pursuant to the Georgia Arbitration Act.**

In addition to being empowered and required to stay these proceedings under the Federal Arbitration Act, this Court should stay these proceedings pending outcome of the Arbitration in accordance with the Georgia Arbitration Act, O.C.G.A. §9-9-6.

O.C.G.A. §9-9-6(a) states in part as follows:

> (a) A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. If the court determines there is no substantial issue concerning the validity of the agreement to submit to arbitration or compliance therewith and the claim sought to be arbitrated is not barred by limitation of time, the court shall order the parties to arbitrate. . . . If an issue claimed to be arbitrable is involved in an action pending in a court

having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

Defendant and Plaintiff in Counterclaim, St. Paul, has done all that is necessary to pursue its arbitration remedy, and has filed its Answer and Counterclaim subject to its Demand for Arbitration and insistence that the issues involved in this action be arbitrated in the pending Arbitration commenced by St. Paul. This Court is therefore required to stay this action pending the outcome of the said Arbitration. See Tillman Group, Inc. v. Keith, et al., 201 Ga. App. 680, 411 S.E.2d 794 (1991).

3. **Conclusion.**

For all of the reasons stated above, Defendant and Plaintiff in Counterclaim, St. Paul Fire and Marine Insurance

Company, respectfully submits that this action should be stayed and the Arbitration be ordered to proceed.

Respectfully submitted,
WASSON, SOURS & HARRIS, P.C.

/s/ W. Hensell Harris, Jr. for
Edward H. Wasson, Jr.
Georgia Bar No. 739800

/s/ W. Hensell Harris, Jr.
W. Hensell Harris, Jr.
Georgia Bar No. 331600

Attorneys for Defendant and Plaintiff in Counterclaim, St. Paul Fire and Marine Insurance Company

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Suite 1000
Atlanta, Georgia 30339
(404) 956-1700

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served a copy of the foregoing "Brief in Support of Motion to Stay Proceedings Pending Arbitration," via U.S. Mail, postage prepaid, and properly addressed to the following:

John A. Christy, Esq.
David H. Flint, Esq.
Schreeder, Wheeler & Flint
16th Floor, The Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845

Dated this 24th day of April, 1995.

WASSON, SOURS & HARRIS, P.C.

/s/ W. Hensell Harris, Jr.
W. Hensell Harris, Jr.
Georgia Bar No. 331600

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Atlanta, Georgia 30339
(404) 956-1700

APPENDIX Q

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

JOHN M. BARGE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	File No.
ST. PAUL FIRE AND MARINE INSURANCE COMPANY,	)	E-35589
	)	
	)	
Defendant.	)	

ORDER

(Filed October 6, 1997)

The judgment of the Court of Appeals of the State of Georgia was made the judgment of this Court on August 1, 1997. As the parties have agreed that no other issues remain in the underlying case, the above-referenced action has been administratively closed, effective August 1, 1997.

This 6th day of October, 1997.

/s/ Elizabeth E. Long

JUDGE ELIZABETH E. LONG
Superior Court of Fulton County
Atlanta Judicial Circuit

cc:
Edward H. Wasson, Jr., Esq.
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